(19)

No. 93-908

In The

Supreme Court of the United States

October Term, 1993

CHARLES J. REICH,

Petitioner,

v.

MARCUS E. COLLINS and
THE GEORGIA DEPARTMENT OF REVENUE,

Respondents.

**On Writ Of Certiorari
To The Supreme Court Of Georgia**

BRIEF FOR RESPONDENTS

WARREN R. CALVERT
Senior Assistant Attorney
General
(Counsel of Record
for Respondents)

MICHAEL J. BOWERS
Attorney General

DANIEL M. FORMBY
Senior Assistant Attorney
General

Attorneys for Respondents

Georgia Department of Law
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3370

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the predeprivation procedures available to Petitioner under Georgia law to dispute the state income tax imposed on his federal retirement benefits satisfied Due Process.

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BRIEF FOR RESPONDENTS

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner's statement of the "Constitutional Provisions And Statutes Involved" does not refer to or append a copy of Georgia's affidavit of illegality provision, O.C.G.A. § 48-3-1, which is one of Georgia's predeprivation tax procedures. The text of O.C.G.A. § 48-3-1 is set out in Appendix A hereto.

STATEMENT OF THE CASE

On March 28, 1989, this Court ruled in *Davis v. Michigan*, 489 U.S. 803 (1989), that income tax statutes in Michigan, which provided for the taxation of federal retirement benefits but exempted retirement benefits paid by the state and its political subdivisions, violated 4 U.S.C. § 111 and principles of intergovernmental tax immunity. At the time of the *Davis* decision, Georgia's income tax statutes totally exempted pension income received from the Employees' Retirement System of Georgia, the Teachers Retirement System of Georgia, and certain other retirement systems, *see* O.C.G.A. § 48-7-27(a)(4) (1982), but did not afford the same treatment to federal retirement benefits. In response to *Davis*, the Georgia General Assembly, during special session in September 1989, amended Georgia's law to provide identical treatment for federal, state, and private pensions, for the tax years 1989 and forward. *See* O.C.G.A. § 48-7-27(a)(5) (Supp. 1993).

Shortly after *Davis* was announced, Petitioner Charles J. Reich ("Colonel Reich" or "the taxpayer") filed refund claims with the Georgia Department of Revenue for Georgia income taxes which he had previously paid on his military retirement benefits for the years 1985 through 1988. (Reich Dep., Exh. 6-9). At the time such taxes were paid, Col. Reich did not protest or otherwise indicate that he believed the tax treatment of his retirement benefits to be invalid. (Reich Dep., pp. 34 and 52). When the Department denied his claims (Reich Dep., Exh. 30), the taxpayer brought suit under the income tax refund statute, O.C.G.A. § 48-2-35, contending that Georgia's taxation of such amounts violated the principles set forth in *Davis*, the Fifth and Fourteenth Amendments to

the U.S. Constitution, and comparable provisions of the Georgia Constitution. (J.A. 33-37). Both the Respondents and the taxpayer subsequently filed motions for summary judgment. (R. 23 and 123).

In its final order, the trial court ruled that Georgia's pre-1989 income tax statute was legally indistinguishable from the statute considered in *Davis*. Petition for Writ of Certiorari, Appendix E. However, the trial court also determined, based on the three-part test set forth in *Chevron Oil v. Huson*, 404 U.S. 97 (1971), that *Davis* should not be applied retroactively to any tax years ending before the *Davis* decision was rendered, and that no refunds were due. The Georgia Supreme Court granted Col. Reich's application for discretionary appeal. *See* O.C.G.A. § 5-6-35(a).

On November 19, 1992, the Georgia Supreme Court held that the state's pre-1989 income tax statutes violated the principles of *Davis*, and that this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), mandated retroactive application of *Davis*. *Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846 (1992) (hereinafter "*Reich I*"). However, the Georgia Supreme Court also determined that O.C.G.A. § 48-2-35, which provides for refunds of taxes "erroneously or illegally assessed and collected", did not apply to taxes paid under a law later held unconstitutional, and that Col. Reich was therefore not entitled under that statute to the refunds he sought. After his motion for reconsideration was denied, the taxpayer filed a petition for certiorari with this Court, contending, *inter alia*, that Due Process entitled him to refunds if Georgia's refund statute did not.

On June 18, 1993, this Court issued its decision in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993). In *Harper* the Court held, based on the reasoning of its earlier decision in *Beam*, that *Davis* applied retroactively to tax years before 1989. *Id.* at 2516-18. The Court noted at the same time, however, that "federal law does not necessarily entitle [federal retirees] to a refund" of amounts paid on their benefits for years before 1989 under income tax statutes invalidated by *Davis*. *Id.* at 2519. "Rather, the Constitution requires [a state simply] 'to provide relief consistent with federal due process principles.' " *Id.* at 2519 (quoting *American Trucking Assns. v. Smith*, 496 U.S. 167, 181 (1990) (plurality opinion)). The Court reversed the Virginia court's earlier holding that *Davis* applied prospectively only, but remanded for resolution of the distinct remedial issues which remained. *Id.* at 2520. Two weeks later, this Court vacated the decision in *Reich I*, and remanded for reconsideration in light of *Harper*. 61 U.S.L.W. 3867 (U.S. June 28, 1993).

On December 2, 1993, the Georgia Supreme Court held on remand that Due Process did not entitle the taxpayer to a refund of the taxes he paid on his federal retirement benefits prior to the decision in *Davis*, since Georgia law provided adequate predeprivation procedures by which he could have contested his taxes prior to payment. *Reich v. Collins*, 263 Ga. 602, 437 S.E.2d 320 (1993) (hereinafter "*Reich II*"). The taxpayer filed his petition for certiorari on December 8, 1993, and certiorari was granted on February 22, 1994.

Response to the Petitioner's Statement of the Case

Petitioner's Statement Of The Case contains numerous assertions that are unsupported in the record and potentially misleading. For example, the taxpayer states that after *Davis* "the director of the Georgia Revenue Department's Income Tax Division 'recommend[ed] pensioners file state income tax Form 500-X by April 17.' " Petitioner's Brief, p. 4. No effort was made in the trial court to establish a record concerning any such statements. Except for a newspaper article which coincidentally refers to statements purportedly made by a Revenue Department official, which was attached for other reasons as an exhibit to a deposition taken by the taxpayer, *see* Thomassen Dep., Exh. 2, there is nothing whatsoever in the record regarding such statements.[1] Moreover, Col. Reich seems to be suggesting that statements made after *Davis* misled him into foregoing a pre-payment challenge to his taxes, even though the amounts which he seeks to recover were paid prior to this Court's decision in *Davis*.

Col. Reich makes factual assertions concerning other federal retirees, none of whom are parties to this case. *See, e.g.*, Petitioner's Brief, p. 5 ("many federal retirees refused to pay the income tax due on April 17, 1989 for tax year 1988"); *id.* ("The State . . . issu[ed] assessment notices for . . . 1988 tax to Col. Reich and other retirees including both penalties and interest."); *id.* at 7 n.7 ("Col. Reich was the first retiree, and only one of a handful, who received a denial. Most claimants received no response to

[1] Petitioner refers elsewhere in his brief to newspaper articles that are not a matter of record, and he makes factual assertions based thereon. *See* Petitioner's Brief, p. 28.

their claims."); *id.* (referring to advice received by other retirees from the Georgia Attorney General). Although some of these statements may be accurate at least in part, it is unclear what Col. Reich's purpose is in including them as part of his Statement Of The Case, and Respondents therefore feel compelled to point out that none is a matter of record.

SUMMARY OF THE ARGUMENT

Because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy Due Process. In recognition of the State's "exceedingly strong interest in financial stability", the Court has held that a State need not provide any predeprivation process. Instead, a State may require taxpayers to pay first and litigate their liabilities by way of a post-deprivation (i.e., refund) action later. If the State chooses to provide a predeprivation hearing, however, the availability of such a procedure will be sufficient by itself to satisfy Due Process. Taxpayers who fail to avail themselves of such a procedure, and who pay a tax under a statute later held unconstitutional, cannot contend that their Due Process rights have been violated.

There were numerous predeprivation procedures available under Georgia law by which Petitioner could have challenged the Georgia income tax imposed on his federal retirement benefits prior to payment: an action for declaratory judgment or injunctive relief; an appeal under Georgia's Administrative Procedure Act from a

deficiency assessment of additional taxes; an appeal directly to superior court from a deficiency assessment; or an affidavit of illegality. Under Georgia's statutory and case law, each such procedure would have given Petitioner a fair opportunity to contest his liability prior to payment and a clear and certain remedy if he prevailed – that is, relief from any obligation to pay the disputed amounts. Petitioner's arguments to the contrary center principally around his apparent belief that Due Process is not satisfied if *any* doubt can be raised regarding the availability or scope of the pre-payment procedure. There is no support for such a Due Process standard.

Petitioner was not subjected to "constitutionally significant" duress forcing him to forego a predeprivation challenge and pay his disputed taxes. Due Process is a flexible standard, which should properly take into account the State's legitimate financial interest in seeing that taxes which are legally due are promptly paid. According to Petitioner and his amici, "constitutionally significant" duress exists whenever a State may impose penalties on a taxpayer who contests his liability prior to payment and loses – even, assumedly, if he has asserted frivolous claims or disputed his liability in bad faith. This "test" ignores the State's financial interests. In fact, the various statutory provisions to which Col. Reich objects – those concerning Georgia's failure-to-pay penalty, interest on unpaid liabilities, potential criminal prosecution, and various collection procedures – are all reasonable measures designed to see that taxes are paid if they are legally owed, and none is at all like the sanctions and penalties involved in the Court's prior cases concerning "duress".

Petitioner's arguments concerning the Due Process adequacy of Georgia's predeprivation tax procedures depend in large part on Petitioner's claim that the Georgia Supreme Court, by construing Georgia's income tax refund statute to be inapplicable to taxes paid under a statute later held unconstitutional, deprived him of Due Process. This is precisely the question which this Court refused to accept for review. Petitioner and his amici try to insinuate that issue back into this case because they do not want to believe that a taxpayer can ever properly be denied a refund of taxes paid under a statute which is later invalidated, except perhaps for failing to comply with a refund statute's procedural requirements. The Court's decisions are clear, however: a State which has provided a taxpayer with adequate pre-payment procedures has done all that Due Process requires.

The amicus brief of James B. Beam Distilling Co. ("Beam"), which has been filed ostensibly to address the issues in this case, in fact argues the merits of Beam's own lawsuit against the State of Georgia. (Beam's lawsuit is now pending on petition for certiorari with this Court.) Although the issues overlap to some extent, this case and Beam's are distinct, involving, *inter alia*, different tax statutes and other predeprivation procedures.

Finally, even if Georgia's predeprivation tax procedures did not satisfy Due Process, Petitioner is not entitled to a judgment directing that refunds be paid. Sovereign immunity precludes such a recovery, and the Court should either so hold or permit the Georgia courts to consider the issue on remand. Even without regard to sovereign immunity, however, the State's reasonable reliance interests and other equitable considerations

should be taken into account in deciding what relief should be given to Petitioner. When these factors are properly weighed, it is clear that refunds should not be ordered. The Court should either deny outright an award of refunds, or permit the Georgia courts themselves, on remand, to weigh these factors in determining the appropriate relief.

ARGUMENT

I. THE PREDEPRIVATION PROCEDURES AVAILABLE TO PETITIONER UNDER GEORGIA LAW TO DISPUTE THE STATE INCOME TAX IMPOSED ON HIS FEDERAL RETIREMENT BENEFITS SATISFIED DUE PROCESS

In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990) this Court stated:

> [I]f a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

Id. at 31 (footnotes omitted). However, "[i]n order to satisfy the commands of the Due Process Clause [, the] State may choose to provide a form of 'predeprivation process' ". *Id.* at 36-37 (footnotes omitted). If Georgia's predeprivation tax procedures provided Petitioner with "a fair opportunity to challenge the accuracy and legal validity of [his] tax obligation [prior to payment and] a

'clear and certain remedy' " if he prevailed, *id.* at 39, Due Process has been fully satisfied. *See id.* at 38 n.21 ("The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivation sufficient *by itself* to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure.") (emphasis added). These principles were reaffirmed in *Harper,* 113 S. Ct. at 2519.

A. Georgia Law Provided Petitioner With Numerous Predeprivation Tax Procedures

The "clear and certain" remedy provided to the taxpayer who prevails under any one of Georgia's predeprivation tax procedures is obvious: he is relieved of any obligation to pay the disputed amounts. There is no question but that such relief would have fully vindicated Col. Reich's constitutional rights concerning the taxing of his federal retirement benefits. Col. Reich's arguments regarding the Due Process sufficiency of Georgia's predeprivation tax procedures center instead on his apparent belief that if *any* doubt can be raised concerning the availability or scope of such a procedure, the procedure cannot satisfy Georgia's Due Process obligation. *See, e.g.,* Petitioner's Brief, p. 18 ("Any federal retiree who sought a declaratory judgment ran the risk that the action would be dismissed"); *id.* at 24 ("[J]urisdiction [under Georgia's Administrative Procedure Act] is ambiguous"). A taxpayer is not deprived of a "fair opportunity" to litigate his tax liability unless the State's predeprivation procedures meet Col. Reich's standard. Except in extraordinary circumstances not present here, litigants properly

must "assume the risk that the ultimate interpretation by the highest court [of any particular procedure] might differ from [their] own." *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 682 n.9 (1930).

Petitioner's specific arguments concerning Georgia's particular predeprivation procedures are addressed below.

1. Suit for declaratory judgment or injunctive relief

In the opinion below, the Georgia Supreme Court noted that one predeprivation procedure which Col. Reich could have used to challenge his taxes prior to payment was a lawsuit for declaratory judgment and injunctive relief. On pages 17-18 of his brief, Col. Reich asserts that:

> the State is generally immune from declaratory judgment actions based on sovereign immunity. [Citations omitted.] The exception to this general rule is a statutory waiver of sovereign immunity. [Citations omitted.] A declaratory challenge to the income tax does not fall within any statutory waiver by the State of its immunity, and such an action would be dismissed for failure to state a claim upon which relief can be granted. [Citations omitted.]

According to Col. Reich, "this is precisely what happened to Petitioner's claims for declaratory relief that were filed in April 1989." *Id.* at 18.

However, notwithstanding the bar which sovereign immunity would normally present to a lawsuit against

the government, there are numerous Georgia cases which have entertained actions for declaratory judgment and for injunctive relief brought by taxpayers to challenge *unconstitutional* statutes and taxes. *See, e.g., Blackmon v. Golia*, 231 Ga. 381, 202 S.E.2d 186 (1973) (challenge to alcohol tax statute upheld); *City Council of Augusta v. Mangelly*, 243 Ga. 358, 254 S.E.2d 315 (1979) (sales tax statute); *Rogers v. DeKalb County Bd. of Tax Assessors*, 247 Ga. 726, 279 S.E.2d 223 (1981) (ad valorem tax); *Wages v. Michelin Tire Corp.*, 233 Ga. 712, 214 S.E.2d 349 (1975), *aff'd*, 423 U.S. 276 (1976) (property taxes); *Richmond County Property Owners Ass'n v. Augusta-Richmond County Coliseum Authority*, 233 Ga. 94, 210 S.E.2d 172 (1974) (beer license and tax); *City of Lithonia v. DeKalb County Bd. of Educ.*, 231 Ga. 150, 200 S.E.2d 698 (1973) (alcoholic beverages tax); *Robbins v. City of Rome*, 230 Ga. 901, 199 S.E.2d 802 (1973) (professional license tax); *DeKalb County v. Allstate Beer, Inc.*, 229 Ga. 483, 192 S.E.2d 342 (1972) (alcoholic beverages audit fee).

There have been at least two such cases challenging the constitutionality of state income tax statutes. *See Parrish v. Employees' Retirement System*, 260 Ga. 613, 398 S.E.2d 353 (1990), *cert. denied*, 111 S. Ct. 2016 (1991) (suit for declaratory and injunctive relief, contesting constitutionality of an amendment to income tax statute); *Featherstone v. Norman*, 170 Ga. 370, 153 S.E. 58 (1930) (suit for injunction restraining enforcement of Income Tax Act of 1929, on grounds of alleged unconstitutionality). As stated by the Georgia Supreme Court in *Chilivis v. National Distrib. Co.*, 239 Ga. 651, 654, 238 S.E.2d 431, 433 (1977), "[t]he rule that the state may not be sued without its consent is not applicable to an action where injunction

is sought to prevent the commission of an alleged wrongful act by an officer of the state acting under color of office but without lawful authority". *Accord Undercofler v. Seaboard Air Line R.R.*, 222 Ga. 822, 826-27, 152 S.E.2d 878, 882-83 (1966) (suit for injunction to restrain tax treatment allegedly contrary to state and federal constitutions was not a prohibited suit against the State).

Col. Reich also states that "Georgia courts have ruled that declaratory relief is not available where other statutory remedies have been specifically provided". Petitioner's Brief, p. 18. However, O.C.G.A. § 9-4-2(c) expressly provides that "[r]elief by declaratory judgment shall be available, notwithstanding the fact that the complaining party has any other adequate legal or equitable remedy or remedies." The case of *George v. Department of Natural Resources*, 250 Ga. 491, 299 S.E.2d 556 (1983), cited on page 18 of the Petitioner's brief, stands merely for the proposition that the courts will not entertain an action for declaratory relief where to do so would disrupt an ongoing administrative proceeding. Similarly, neither *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941), nor *Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4 (1972), supports Col. Reich's statement that "equitable relief for federal retirees . . . was absolutely prohibited . . . because there was an adequate remedy at law under the refund statute." Petitioner's Brief, p. 23.[2]

[2] Neither case concerned an effort to enjoin an allegedly unconstitutional tax statute prior to payment of the tax thereunder. In *Wright v. Forrester*, the taxpayer, who had pursued a refund claim under the predecessor of O.C.G.A. § 48-2-35, subsequently brought a mandamus action under the refund statute to compel approval of his claim. 192 Ga. at 866, 16 S.E.2d at 874.

It is also revealing that Col. Reich participated in an action for declaratory judgment and injunctive relief challenging the continued constitutionality of Georgia's tax scheme following *Davis*. *See* J.A. 5-9. (That lawsuit, *Avery T. Salter, et al. v. The State of Georgia, et al.*, Fulton Superior Court, Civil Action No. D-71448, was filed after Col. Reich had paid the taxes he now wants refunded. Reich Dep., Exh. 24.) Although that action was subsequently dismissed, it was not for the reasons alleged by Petitioner. *See* Petitioner's Brief, pp. 5, 6, and 18. When the General Assembly amended Georgia's income tax statutes, eliminating the disparate treatment of federal and state retirement benefits, the *Salter* plaintiffs' claim concerning the statutes' continued constitutionality was mooted. *See generally Waldron v. Collins*, 259 Ga. 582, 582, 385 S.E.2d 74, 74-75 (1989) ("The enactment of HB No. 1 EX has determined the future legal implications of the challenged provisions by repealing them. . . . Hence, no judicial decision is needed to determine prospectively the legality of a non-existent statute.") Clearly, Col. Reich's earlier lawsuit was "the wrong type of action[ ]" *to secure a refund*, and "when the Georgia General Assembly amended Georgia's income tax provisions . . . there . . . was [also] no controversy as to the present that

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The Georgia Supreme Court held merely that the refund statute did not provide for mandamus, affirming the trial court's dismissal of the complaint. In *Henderson v. Carter*, the Georgia Supreme Court affirmed the dismissal of a mandamus action seeking certain sales tax refunds because, among other reasons, the taxpayer had an adequate legal remedy under the refund statute. 229 Ga. at 880, 195 S.E.2d at 7.

would permit [an action for declaratory or injunctive relief] to lie." J.A. 45.

Petitioner complains that "declaratory relief . . . offers no assurance of a decision before the income tax is due." Petitioner's Brief, p. 19. Code Section 9-4-3(a) permits the court, "in order to maintain the status quo pending the adjudication of the questions [presented in a declaratory judgment action]", to grant interlocutory injunctive relief. *If* the taxpayer cannot obtain an expeditious ruling, and *if* the taxpayer cannot obtain at least an interlocutory injunction against enforcement of the statute alleged to be unconstitutional, when the Revenue Department issues an assessment he can appeal under O.C.G.A. §§ 48-2-59 or 50-13-12. *See infra.*

For the first time, Col. Reich argues that O.C.G.A. § 48-7-84 "stands as an absolute bar to enjoining the income tax pending a judicial determination of its illegality." Petitioner's Brief, p. 20. Whether that Code provision applies to a constitutional challenge to a tax has never been decided in Georgia, nor are Respondents aware of any instance where the State Revenue Commissioner has tried to assert it as a bar in such a situation. *See generally Parrish v. Employees' Retirement System*, 260 Ga. 613, 398 S.E.2d 353 (1990), *cert. denied*, 111 S. Ct. 2016 (1991) (injunctive suit challenging the constitutionality of an amendment to income tax statute). Because Col. Reich did not even raise that provision in the Georgia courts, there was no ruling on this issue below, and Col. Reich

should be precluded from arguing this point of Georgia law now.[3]

2. **Administrative appeal**

A taxpayer may, within 30 days of the issuance of a deficiency assessment against him, request a hearing under Georgia's Administrative Procedure Act ("APA"). O.C.G.A. § 50-13-12. If he receives an adverse administrative decision, the aggrieved taxpayer may seek superior and appellate court review. O.C.G.A. §§ 50-13-19, -20. *See Gainesville-Hall County Economic Opportunity Organization, Inc. v. Blackmon*, 233 Ga. 507, 212 S.E.2d 341 (1975); *Waldron v. Collins*, 788 F.2d 736, 738 (11th Cir.), *cert. denied*,

[3] In fact, there is authority which indicates that Code Section 48-7-84 does not apply in a situation like this, based on the Georgia courts' interpretation of O.C.G.A. § 48-3-26. Code Section 48-3-26 provides generally that "[n]o . . . judicial interference [may] be had in any levy or distress for taxes under [Georgia's tax code]". Despite this seemingly broad language, the Georgia courts have stated that injunctive relief may be given where there is "[a]n unconstitutional exaction, because what is then called a tax is no tax." *Harris Orchard Co. v. Tharpe*, 177 Ga. 547, 547, 170 S.E. 811, 811 (1933). *Accord Vincent v. Poole*, 181 Ga. 718, 184 S.E. 269 (1936). What is now O.C.G.A. § 48-7-84 was first enacted into Georgia law in 1931. *See* 1931 Ga. Laws Ex. Sess. 24, § 40. Six years later, in an action involving state income taxes, the Georgia Supreme Court repeated with approval "the general rule that 'injunction will lie, at the instance of any taxpayer who has not estopped himself, to enjoin a sale of his property for the collection of an *unauthorized* tax.' " *Carreker v. Green & Milan*, 183 Ga. 864, 864, 189 S.E. 836, 836 (1937) (quoting *Fulton Trading Co. v. Baggett*, 161 Ga. 669, 671, 131 S.E. 358, 359 (1926)) (emphasis added).

479 U.S. 884 (1986). Col. Reich complains that "jurisdiction under the APA is not triggered until the Revenue Department takes some action[, and t]he Department may choose not to issue an assessment or wait to issue an assessment." Petitioner's Brief, p. 24. In the meantime, he asserts, "the taxpayer remains exposed to criminal prosecution." *Id.* Unless this particular objection refers solely to the "risk" of criminal prosecution, which is addressed *infra*, it is difficult to fathom. If he had treated his federal retirement benefits as tax-exempt on his Georgia income tax returns for the periods in question, and the Department never issued a deficiency assessment, his position would have effectively been vindicated.

Col. Reich also argues that "jurisdiction under Georgia's APA to review a tax statute is unclear. . . . Petitioner was not aggrieved by an act of the department, but by an unconstitutional act of the legislature." *See generally* O.C.G.A. § 50-13-12 ("The Department of Revenue shall hold a hearing upon written demand therefor by any taxpayer aggrieved by any act of the department in a matter involving his liability for taxes"). However, "the issuance of a final assessment by the Commissioner has been treated as an act by which a taxpayer is aggrieved[, within the meaning of Georgia's APA]." Buckland, *State Taxpayer Remedies*, 27 Mer. L. Rev. 309, 315 (1975). *Accord* Harrold, *A Practical Guide To State Tax Practice*, 15 Ga. St. B. J. 74, 76-77 (1978). If Col. Reich had treated his retirement benefits as tax-exempt on his Georgia returns, and a deficiency assessment had followed, Col. Reich would assuredly have been "aggrieved by an act of the department" and entitled to appeal under the APA.

Col. Reich also contests the Due Process sufficiency of an APA appeal in his situation because "[the Revenue Department does not have] authority to strike a tax statute. . . . Thus, the resort to administrative review would have been completely useless". Petitioner's Brief, p. 24. *See also* Brief Amici Curiae of National Association of Retired Federal Employees ("NARFE"), *et al.*, p. 14 ("Administrative review is unavailing to taxpayers challenging unconstitutional taxation because the administrative tribunal is 'powerless' to provide relief.") Without dispute, where the constitutional validity of a statute is challenged before an administrative hearing officer or board in Georgia, the officer or board is without power to declare the statute unconstitutional. *Flint River Mills v. Henry*, 234 Ga. 385, 216 S.E.2d 895 (1975). However, the constitutional issues may be raised before the administrative hearing officer in a tax appeal brought under O.C.G.A. § 50-13-12, and those issues will be resolved by the superior court and appellate courts on review of the agency decision. *See Georgia Real Estate Comm'n v. Burnett*, 243 Ga. 516, 255 S.E.2d 38 (1979). *See generally State Bd. of Equalization v. Trailer Train Co.*, 253 Ga. 449, 320 S.E.2d 758 (1984) (involving ad valorem tax appeals brought under O.C.G.A. § 48-2-18); *Foster v. Georgia Bd. of Chiropractic Examiners*, 257 Ga. 409, 410-11, 417-19, 359 S.E.2d 877, 878, 883-84 (1987) (deciding constitutional claim on appeal from administrative proceeding). Given the further review which is available, Col. Reich is wrong when he asserts that an APA appeal of a Revenue Department assessment against him would have been futile.

3. Superior court appeal

After receiving a notice of assessment, a taxpayer may choose to forego an administrative hearing, and appeal directly to the superior court. O.C.G.A. § 48-2-59. *See Gainesville-Hall County Economic Opportunity Organization, Inc. v. Blackmon*, 233 Ga. 507, 212 S.E.2d 341 (1975); *Waldron v. Collins*, 788 F.2d 736, 738 (11th Cir.), *cert. denied*, 479 U.S. 884 (1986). Petitioner does not appear to dispute that he could have excluded his federal retirement benefits from income reported on his Georgia return and appealed the resulting deficiency assessment under Code Section 48-2-59. Other than his arguments concerning the "risk" of criminal prosecution and forced collection during such an appeal – arguments which Respondents address *infra* – Col. Reich's only complaint with this predeprivation procedure seems to be with the requirement that a taxpayer who appeals must provide adequate security in case he loses. *See* O.C.G.A. § 48-2-59(c). Petitioner's Brief, p. 26.[4]

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[4] During his discussion of superior court appeals, Petitioner also states that "no assessment is required to begin collection" of the unpaid amount shown on Petitioner's 1988 Georgia income tax return. He also says that "the Commissioner could enter an execution [for that amount] which would impose a lien" on Petitioner's property. *Id.* at 26. It is not clear what point Col. Reich is trying to make. Col. Reich's 1988 return itself treated his federal retirement benefits as taxable and reflected an amount due, which he simply refused to pay. (Reich Dep., Exh. 17 and 25.) If Petitioner had reported his federal retirement benefits as tax-exempt, the Department would have had to issue a deficiency assessment to pursue the matter further, and Petitioner would have been entitled to appeal. (It is undisputed that the Revenue Department, other than sending certain initial notices, has not in fact attempted to collect any additional taxes from Col. Reich for 1988.)

Col. Reich's argument was rejected by the Court over one hundred years ago. In *McMillen v. Anderson*, 95 U.S. 37 (1877), the taxpayer argued that a statute which permitted the collection of disputed taxes to be enjoined was insufficient for Due Process purposes because the statute required that a bond be posted for double the amount at issue. "[I]t is said that this is not due course of law, because the judge granting the injunction is required to take security of the applicant, and that no remedial process can be within the meaning of the Constitution which requires such a bond as a condition precedent to its issue." *Id.* at 42. This assertion gave the Court but little pause:

> It can hardly be necessary to answer an argument which excludes from the definition of due process of law all that numerous class of remedies in which, by the rules of the court or by legislative provisions, a party invoking the powers of a court of justice is required to give that security which is necessary to prevent its process from being used to work gross injustice to another.

Id. See generally Lindsey v. Normet, 405 U.S. 56, 77 (1972) ("a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue").

In *Ownbey v. Morgan*, 256 U.S. 94 (1921), this Court rejected the argument that Due Process was violated by a state statute which required the defendant in a foreign attachment case to provide security before the defendant could appear and contest the merits of the plaintiff's demand.

> It is said the essential element of due process – the right to appear and be heard in defense of the action – is lacking. But the statute in plain terms gives to defendant the opportunity to appear and make his defense, conditioned only upon his giving security to the value of the property attached. Hence the question reduces itself to whether this condition is an arbitrary and unreasonable requirement, so inconsistent with established modes of administering justice that it amounts to a denial of due process.

Id. at 102-103. The Court held that the bond requirement did not deny the defendant's Due Process rights, observing that "[t]he due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall." *Id.* at 110-11. *See generally Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 553 (1949) ("A state may [generally] set the terms on which it will permit litigations in its courts[, without thereby offending Due Process]. . . . [I]t is [normally] within the power of a state to close its courts to . . . litigation if the condition of reasonable security is not met.")

Finally, NARFE states that "[b]ecause the bond requirement is simply a deprivation of a different order, judicial review of [an assessment] is not a *pre*deprivation remedy." Brief of Amici Curiae NARFE, *et al.*, p. 8 n.5 (emphasis in original). It is clear that NARFE misunderstands what is really meant by *McKesson's* use of the terms "predeprivation" and "post-deprivation". An appeal under Code Section 48-2-59 is "predeprivation"

because the taxpayer obtains a decision on the constitutionality of the tax prior to having to pay, and because the taxpayer does not have to pay those amounts if he wins. Such an appeal is not "post-deprivation" just because the taxpayer may have certain expenses, such as the cost of a surety bond, attorney's fees, filing fees, etc., if he wants to initiate such an action.

4. Affidavit of illegality

If the taxpayer has chosen not to pursue any other predeprivation remedy, and faces a Revenue Department writ of execution for the disputed taxes, an "affidavit of illegality" is available to stop any actual collection efforts. O.C.G.A. § 48-3-1. The only real objection which Col. Reich seems to have with the Due Process adequacy of this predeprivation procedure is the requirement that the taxpayer give "good and solvent bond" for the amount at issue. See Petitioner's Brief, p. 26 n.18. That objection is disposed of by the authorities cited *supra*.

B. Petitioner Was Not Subject To "Constitutionally Significant" Duress Forcing Him To Forego A Predeprivation Challenge

In addition to his other objections to each of Georgia's predeprivation tax procedures, Col. Reich argues that he was subject to "constitutionally significant" duress which forced him to forego a predeprivation challenge and pay the disputed taxes rather than contest them. *See* Harper, 113 S. Ct. at 2519 n.10. For purposes of determining whether "constitutionally significant" duress

existed, however, Col. Reich and supporting amici propose a rigid standard which is incompatible with Due Process principles. "Due process, as this Court often has said, is a flexible concept that varies with the particular situation." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). "[T]he nature of the procedure required to comply with the due process clause depends on many factors concerning the individual deprivation." Rotunda & Nowak, *Treatise On Constitutional Law: Substance and Procedure*, § 17.7, p. 643 (2nd ed. 1992). In *Mathews v. Eldridge*, 424 U.S. 319 (1976) this Court stated that the following factors should properly be taken into account in determining the type of "due process" required in particular situations:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail.

424 U.S. at 335.

This Court has long recognized the essential role that taxes play in the lives of the states and their citizens. *See Springer v. United States*, 102 U.S. 586, 594 (1880) ("The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of the government"); *Dows v. Chicago*, 11 Wall. 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to

obtain the means to carry on their respective governments.") As a consequence,

> [although] "[w]e have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest,' " *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542 (1985) (citation omitted), it is well established that a State need not provide predeprivation process for the exaction of taxes. Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult.

McKesson, 496 U.S. at 37 (emphasis in original and footnote omitted).

This Court has properly given the "government's exceedingly strong interest in financial stability", *id.*, great weight in determining that Due Process does not require a state to provide taxpayers with any predeprivation process *at all*. Nevertheless, Col. Reich and supporting amici assert that this same interest should be virtually disregarded when evaluating the Due Process adequacy of the predeprivation tax procedures which *were* available to Col. Reich in Georgia. Amicus Committee On State Taxation ("COST") acknowledges that "[t]he Due Process Clause embodies . . . principles of . . . balancing of interests (the State's and the individual's)". Amicus Brief of COST, p. 3. COST also agrees that "[i]n the context of state taxes, the [State] interests to be balanced include the

orderly administration of revenue laws . . . [and] the conservation of the public fisc". *Id.* at 6. What emerges from the arguments made by Col. Reich and his amici, however, is an inflexible Due Process test which gives little or no consideration to the State's legitimate financial concerns.

NARFE is the most forthright in articulating the rigid Due Process test which Col. Reich and his supporters want this Court to adopt. In NARFE's view, no predeprivation tax procedure satisfies Due Process unless a taxpayer who pursues a pre-payment challenge to his liability is guaranteed that he will have to pay only the principal tax itself and "market" interest if he loses – even, assumedly, if he has asserted frivolous claims or disputed his liability in bad faith. *See* Brief Amici Curiae of NARFE, *et al.*, p. 13. This "test" does not take into account the State's legitimate financial interest in seeing that taxes which are legally owed are promptly paid; it ignores this interest. This standard cannot be gleaned from *McKesson* or the cases upon which *McKesson* relied. "*McKesson* did not resolve . . . the *degree* or *nature* of penalties and sanctions required to conclude that the state has not provided sufficient pre-deprivation procedures." Ervin & Giddings, *Supreme Court Distinguishes Remedy and Retroactivity Issues Affecting State Taxes*, 73 J. Tax'n 296, 302 (1990) (emphasis added). Clearly, the mere *possibility* that a taxpayer *may*, under *certain* circumstances, be subject to *some* penalty or sanction cannot be the test for measuring the existence of "constitutionally significant" duress.

To date, this Court has found "duress" only where payment has been tendered to avoid severe sanctions

which were immediate or self-operative. As stated by the Court in *Railroad Co. v. Commissioners*, 98 U.S. 541 (1878):

> [w]here a party pays an illegal demand, with full knowledge of all the facts which render such demand illegal, without an *immediate* and *urgent necessity* therefor, or unless to release his person or property from detention, or to prevent an *immediate* seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back.

Id. at 543-44 (emphasis added). *Accord United States v. New York & Cuba Mail Steamship Co.*, 200 U.S. 488, 494 (1906). "Neither a statute imposing a tax, nor the execution thereunder, nor a mere demand for payment, is treated as duress. It does not necessarily follow that there will be a levy on goods." *Garr, Scott & Co. v. Shannon*, 223 U.S. 468, 471 (1912). On the other hand, the "self-executing" provisions of "[a]n act which declares that where the . . . tax is not paid . . . a penalty of twenty-five per cent *shall* be incurred, the license of the company *shall* be cancelled, and the right to sue *shall* be lost, operate[ ] . . . as duress." *Id.* at 471 (emphasis added). Payment under these circumstances "to avoid the disruption of . . . business" would be payment under "duress". *Id.* at 472.

Whether penalties for nonpayment are "immediate" or "self-executing" looks to the *likelihood* that penalties will actually be incurred if payment is not made. The *degree* of the penalties or sanctions faced by the non-paying taxpayer is also important, because even a mandatory penalty should not necessarily be regarded as "constitutionally significant" duress, if the penalty, for

example, is modest. "The [implied duress] doctrine is based on the concept that the penalty exacted for nonpayment of a tax may be *so severe* that it constitutes coercion and duress." *Private Truck Council of America v. New Hampshire*, 517 A.2d 1150, 1156 (N.H. 1986) (emphasis added). Accordingly, this Court has found constitutionally significant duress only in extreme circumstances: for example, where non-payment of a disputed fee would have invalidated a company's bonds, *see Union Pacific Railroad Co. v. Public Service Comm'n*, 248 U.S. 67 (1918); where non-payment would have forfeited the right to do business, *see Garr, Scott & Co. v. Shannon*, 223 U.S. 468 (1912); and where non-payment would have forfeited the right to do business and raised serious questions regarding the validity of the taxpayer's business contracts, *see Atchison, Topeka & Santa Fe Railway Co. v. O'Connor*, 223 U.S. 280 (1912).

The availability of a predeprivation tax procedure must also be considered in deciding whether "constitutionally significant" duress is present. As stated by the New Hampshire Supreme Court:

> We would have no trouble accepting the plaintiffs' argument [concerning duress] had the plaintiffs' only choices been either payment of the tax or submitting to the penalties imposed upon conviction of a misdemeanor. Simple alternatives, however, were open to the plaintiffs. [T]he plaintiffs could have filed a declaratory judgment action [contesting the constitutionality of the tax].

Private Truck Council of America v. New Hampshire, 517 A.2d 1150, 1156 (N.H. 1986).

Georgia's predeprivation tax procedures distinguish this case from *McKesson*. In *McKesson*, the Court observed that "Florida does not purport to provide taxpayers like petitioner with a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity; rather, Florida *requires* the taxpayers to raise their objections to the tax in a post-deprivation refund action." 496 U.S. at 38 (footnote omitted and emphasis added). As later stated by counsel who represented McKesson, "[t]he Court . . . held that a 'tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure' when a tax *must* be paid to avoid economic sanctions or the seizure of the taxpayer's property." Hellerstein, *Preliminary Reflections On McKesson And American Trucking Associations*, 48 Tax Notes 325, 327 (1990) (quoting *McKesson*, 496 U.S. at 38) (emphasis added).

Amicus NARFE is wrong when it asserts categorically that "[a] taxpayer is subject to 'constitutionally significant duress' when[ever] the state imposes penalties on him if he mounts an unsuccessful challenge to the validity of his taxes", citing *Atchison, Topeka & Santa Fe Railway Co. v. O'Connor*, 223 U.S. 280 (1912). Brief Amici Curiae of NARFE, *et al.*, p. 11. In *Atchison* Justice Holmes suggested that "if . . . the citizen is put at a *serious disadvantage* in the assertion of his legal . . . rights, by defence in the suit, justice *may* require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side." *Id.* at 286 (emphasis added). However, the statutes in *Atchison* provided that failure to pay the tax in question would forfeit a corporation's right to do business in the state. *Id.* at 286.

Because third parties would have been understandably reluctant to enter into contracts or otherwise do business with a company whose franchise was under such a cloud, nonpayment of the tax would have immediately and seriously affected the taxpayer's operations. *Atchison* is therefore properly read as yet another case in which the taxpayer, had it elected not to pay, faced an immediate and serious loss.

Properly read, this Court's decisions lead to the following conclusion: because the Petitioner had predeprivation tax procedures available to him, he was not subject to "constitutionally significant" duress unless – because of the likelihood and severity of a penalty or sanction for non-payment – he had no real choice but to forego such a pre-payment challenge and pay the tax. *See United States v. Mississippi Tax Comm'n*, 412 U.S. 363, 368 n.11 (1973) (taxpayers had "no choice except to pay the [amounts at issue] or else to cease dispensing alcoholic beverages altogether – that is, to discontinue an entire line of business. Obviously, this was *no choice at all*.") (emphasis added). *See also Swift Co. v. United States*, 111 U.S. 22, 28-29 (1884) ("The [taxpayer] had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business.") *See generally Ward v. Love County*, 253 U.S. 17, 23 (1920) ("by threatening to sell the lands of [the taxpayers] and actually selling other lands similarly situated[, county officials] made it appear . . . that they must choose between paying the taxes and losing their lands."); *Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2d Cir. 1986) ("*mandatory* penalties incurred *because a party has chosen to seek judicial review* are unconstitutional where 'the penalties for disobedience are by fines *so*

enormous and imprisonment *so severe* as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation' ") (emphasis added); *Ford Motor Co. v. Coleman*, 402 F. Supp. 475, 484 (D.D.C. 1975) ("[T]he Constitution [does not] dictate[] risk-free litigation. . . . [T]he Constitution is offended when [a] penalty system is of such a nature as to create a *virtual roadblock* to judicial review.") (emphasis added).

Col. Reich does not contend that he was subjected to actual duress to pay the disputed amounts prior to challenging their legality. The record is clear that the taxpayer was never threatened with levy, attachment, garnishment, or other sanctions if he did not pay the taxes whose refund he now seeks. (Reich Dep., pp. 40, 41, and 49). Georgia's statutory provisions concerning the non-payment of taxes are all reasonable measures designed to see that taxes are paid if they are legally owed. Such provisions did not leave Petitioner with "no choice" but to forego a predeprivation challenge and pay the disputed taxes on his federal retirement benefits. The particular provisions to which Petitioner objects are addressed below.

1. Georgia's failure-to-pay penalty

Col. Reich complains that if he had used one of Georgia's predeprivation procedures to challenge the tax on his federal retirement benefits and lost, he might have had to pay a failure-to-pay penalty. *See* O.C.G.A. § 48-7-86(a)(1)(B). Of course, the taxpayer who prevails in such a contest is subject to no penalty whatsoever. Moreover, this penalty – which equals one-half of 1 percent per month, up to a maximum of 25% – may not be imposed "when . . . the failure is due to reasonable cause and not due to willful neglect." O.C.G.A. § 48-7-86(a)(2). "[Tax p]enalties [in Georgia] are not favored, and a statute imposing [such] a penalty must be strictly construed." *State Revenue Comm'n v. National Biscuit Co.*, 179 Ga. 90, 103, 175 S.E. 368, 374 (1934). Consequently, the failure-to-pay penalty cannot properly be assessed against a taxpayer who has a good faith, reasonable basis for contesting his liability under an accepted pre-payment procedure.[5]

The State of Georgia has a legitimate interest in seeing that taxpayers promptly pay taxes which are legally due. Hence, there should be no Due Process problem with a pre-payment procedure which does not preclude a civil penalty, not exceeding 25%, if the taxpayer using that procedure to challenge his taxes does not have a good faith, reasonable basis for his refusal to pay. Georgia's failure-to-pay penalty did not leave Col. Reich with "no choice" but to forego a predeprivation challenge and pay instead. *See generally Reisman v. Caplin*, 375 U.S. 440, 446-47 (1964) ("It is urged that the penalties of contempt risked by a refusal to comply with [IRS] summonses are so severe that the statutory procedure [for contesting

[5] Because he was assessed a failure-to-pay penalty on his unpaid 1988 taxes, Col. Reich suggests that the Georgia Department of Revenue will in fact assess the failure-to-pay penalty against any taxpayer. Petitioner's Brief, pp. 15-16. However, Col. Reich did not initiate a proper predeprivation challenge to his 1988 liabilities. He reported his federal retirement benefits as taxable on his return, and then refused to pay the amount reflected on the return as due. (Reich Dep., Exh. 17 and 25.)

such a summons] amounts to a denial of judicial review. . . . It is sufficient to say that noncompliance is not subject to prosecution thereunder when the summons is attacked in good faith."); *Wagner Electric Corp. v. Thomas*, 612 F. Supp. 736, 743 (D. Kan. 1985) ("even though a penalty might discourage a party from seeking judicial review, that penalty [can] be enforced against a party [who lacks] an objectively good faith challenge"). This Court has never found that a penalty like Georgia's failure-to-pay penalty would alone amount to "constitutionally significant" duress, and there is no reason to so hold in this case.

2. The accrual of interest

The taxpayer also asserts that Georgia's predeprivation remedies do not satisfy Due Process because a taxpayer has to pay interest if he loses. Petitioner's Brief, pp. 14-16. "[I]nterest [is merely] a means of compensation", *United States v. Childs*, 266 U.S. 304, 307 (1924), designed to insure that a state involved in litigation with a taxpayer who has not paid the disputed liability does not lose the time-value of any amounts eventually found to be due. It makes no sense to maintain that a predeprivation remedy violates Due Process unless a losing taxpayer is never subject to interest. This standard is in no way suggested by a fair reading of *McKesson* or any other case, and Respondents know of no pre-payment remedy anywhere which meets such a test.

Perhaps in recognition of this fact, Amicus NARFE asserts that the taxpayer must be guaranteed that he will be subject to no more than "market" interest if he contests

his liability prior to payment and loses. Brief Amici Curiae of NARFE, *et al.*, pp. 12, 13, and 15. Of course, NARFE nowhere clearly indicates how it would measure "market" interest for these purposes. Some consumers may presently be paying as much as 18% annual interest on their credit cards, far more than Georgia's 12% interest rate on unpaid taxes. *See* O.C.G.A. § 48-2-40. NARFE does not say why the State of Georgia should be constitutionally compelled to lend money out at better terms than commercial lenders. Nor does NARFE say when the difference between the interest charged and the presumed "market" rate would be of constitutional moment. For example, the interest rate charged on federal income tax underpayments is based on the average market yield on outstanding U.S. marketable obligations with remaining maturity periods of three years or less, *plus* 3 percentage points. 26 U.S.C. §§ 6621(a)(2) and 1274(d)(1)(C)(i). Under certain circumstances, large corporate underpayments of federal tax accrue interest equal to the average market yield of such obligations, plus 5 percentage points. 26 U.S.C. § 6621(c).

Petitioner was not, in any constitutional sense, compelled to forego a predeprivation challenge to his liability simply because interest would be payable on any deficiency which might be found to be due. The mere possibility of interest is wholly unlike those sanctions and penalties which the Court has in the past treated as "constitutionally significant" duress. The argument concerning "market" interest was never presented in the courts below, and it has not been adequately developed by the Petitioner or his supporting amici here. That argument should therefore be ignored.

3. The "risk" of criminal prosecution

Col. Reich argues that Georgia's predeprivation remedies do not satisfy Due Process because "not paying the contested tax *always* creates the risk that *some* prosecutor will pursue criminal prosecution." Petitioner's Brief, p. 14 (emphasis added). He therefore asserts that "the only way to avoid this risk is to pay the tax." *Id.* at 12. In fact, Col. Reich suggests that the State Revenue Commissioner is obligated to prosecute criminally any taxpayer who has used an accepted method to pursue a reasonable, good faith predeprivation challenge to his tax liability. *Id.* It is uncontested that Col. Reich was never so much as threatened with prosecution.

The taxpayer's contention regarding criminal prosecution is untenable. Col. Reich cites no authority for the proposition that a taxpayer who has used an accepted method to assert a reasonable, good faith predeprivation challenge to his taxes is properly subject to criminal prosecution in Georgia. That would be an astonishing proposition, for the purpose of Georgia's predeprivation procedures is to permit just such challenges. The mere possibility that some state official, acting unreasonably or in bad faith, could conceivably try to prosecute under such circumstances did not subject Col. Reich to "constitutionally significant" duress forcing him to forego any predeprivation challenge. *Cf. Marchetti v. United States*, 390 U.S. 39, 53 (1968) (person invoking Fifth Amendment privilege against self-incrimination must be "confronted by substantial and 'real,' and not merely trifling or imaginary, hazards" of criminal prosecution.) The Commissioner is unaware of any jurisdiction which does not have

appropriate criminal sanctions for taxpayers who willfully refuse to pay taxes they lawfully owe. *See, e.g.*, 26 U.S.C. § 7203. Simply put, Col. Reich believes that no predeprivation remedy satisfies Due Process, and that the *McKesson* inquiry is actually meaningless.

In addition, Col. Reich could not under any circumstances have been prosecuted under Code Section 48-7-2(a)(1), one of the two criminal statutes to which he refers. *See* Petitioner's Brief, pp. 11-12. While Code Section 48-7-2 provides that it is a misdemeanor "for any person who is required to pay any tax . . . imposed by [the income tax provisions of the Revenue Code] to fail to . . . [p]ay the tax", this portion of the statute was declared unconstitutional prior to the date on which Col. Reich would have been required to file his return for 1985, the first tax year at issue in this case. *See State v. Higgins*, 254 Ga. 88, 326 S.E.2d 728 (1985). The taxpayer argues that in *Higgins* the Georgia Supreme Court declared unconstitutional and severed from the statute only that portion permitting *imprisonment* upon conviction and "left standing the alternative punishment of a criminal fine". Petitioner's Brief, p. 11. In fact, when the Georgia Supreme Court found that Code Section 48-7-2(a)(1) unconstitutionally permitted "imprisonment for debt", the court invalidated the provision in its entirety, sustained the defendant's demurrer to the accusation, and ended the prosecution before the question of actual sentencing could even be reached. The court did not uphold the Code section to the extent that fines alone

might be imposed, nor did the court have the authority to do so.[6]

In this case Col. Reich's actions speak far louder than his words. Col. Reich argues vehemently that Georgia's criminal tax statutes placed him under "constitutionally significant" duress to pay his liabilities before challenging their validity. He contends that no taxpayer in Georgia can reasonably be expected to risk even the possibility of prosecution by using one of Georgia's recognized predeprivation tax procedures to dispute his taxes prior to payment. He maintains that "[b]ecause [he] refused to pay 1988 income taxes after *Davis*, Petitioner [still] face[s] the risk of criminal prosecution, the stigma and record of a conviction, and a fine of $1,000 for . . . nonpayment." Petitioner's Brief, p. 12. What is clear, however, is that when Col. Reich saw after *Davis* that there was a legitimate reason to question the validity of Georgia's tax treatment of his military retirement benefits, he did not

[6] One salient feature of a criminal statute is that "imprisonment or the imposition of a fine or both may follow a conviction." *Williams v. State*, 138 Ga. App. 662, 663, 226 S.E.2d 816, 818 (1976). *Accord State v. Steele*, 112 Ga. 39, 42, 37 S.E. 174, 175 (1900) ("No proceeding . . . has ever been held to be a criminal case unless the judgment rendered might in some contingency result in the loss of liberty"). "Where one portion of a statute is constitutional, [the Georgia Supreme Court] has the power to sever that portion . . . and preserve the remainder *if* the remaining portion of the Act accomplishes the purpose the legislature intended." *Nixon v. State*, 256 Ga. 261, 264, 347 S.E.2d 592, 594 (1986) (emphasis added). The Georgia Supreme Court could not transform Code Section 48-7-2(a)(1) from the criminal provision intended by the Georgia legislature into a civil penalty, and *Higgins* does not purport to have done so.

hesitate to refuse to pay any further tax on those benefits. The supposed "duress" created by Georgia's criminal tax provisions can hardly be regarded as "constitutionally significant" if taxpayers like Col. Reich feel free to withhold payment when they have a reasonable, good faith belief that they do not owe the tax.

4. Liens and forced collection action

On pages 16-17 of his brief, Petitioner says he was compelled to forego a predeprivation challenge because of the possibility that liens would be placed on his property for the disputed taxes. Filing of an income tax execution on the general execution docket is required to establish the State's priority position vis-a-vis certain other creditors. O.C.G.A. § 48-2-56(e). However, "[n]either a statute imposing a tax, nor the execution thereunder, nor a mere demand for payment, is treated as duress. It does not necessarily follow that there will be a levy on goods." *Garr, Scott & Co. v. Shannon*, 223 U.S. 468, 471 (1912).

Col. Reich's claims regarding *actual* collection are too attenuated to have left him with "no choice" but to pay rather than dispute his liabilities. Revenue Department garnishments generally proceed "as provided by law regarding garnishments in other cases when judgment has been obtained or execution issued." O.C.G.A. § 48-2-55(b)(2). Consequently, if "the court finds that the defendant has attacked the validity of the [assessment] upon which the garnishment is based in an appropriate forum, the judge may order the garnishment released and

stayed until the validity of the [assessment] has been determined in such forum." O.C.G.A. § 18-4-65(b).

Col. Reich cites absolutely no authority for his claim that the Revenue Department may actually levy on or attach property of a person whose tax liability is properly in court pursuant to an appeal under O.C.G.A. § 48-2-59. The requirement in Code Section 48-2-59(c) that a taxpayer provide "a surety bond or other security. . . . to pay any tax . . . which is found to be due by a final judgment of the court" is to preclude the need for collection of the disputed liability during the litigation. "Even though the filing of an appeal [under Georgia's APA, O.C.G.A. § 50-13-12] does not technically prohibit the Revenue Department from proceeding to collect on the assessment", as a matter of practice, forced sales are not normally made until the matter is finalized. Harrold, *A Practical Guide To State Tax Practice*, 15 Ga. St. B. J. 74, 77 (1978). Moreover, the APA expressly provides a means for staying enforcement of a tax assessment pending a final ruling in any action brought under O.C.G.A. § 50-13-12. *See* O.C.G.A. §§ 50-13-12(c),-19. An action for declaratory and injunctive relief necessarily contemplates a stay of enforcement, as does an "affidavit of illegality" under Code Section 48-3-1.

II. PETITIONER'S ARGUMENTS CONCERNING THE DUE PROCESS ADEQUACY OF GEORGIA'S PREDEPRIVATION TAX PROCEDURES DEPEND SUBSTANTIALLY ON THE ARGUMENT WHICH THIS COURT REFUSED TO ACCEPT FOR REVIEW

In significant part, Col. Reich's arguments concerning the Due Process adequacy of Georgia's predeprivation tax procedures return to the argument that this Court

refused to accept for review: that is, the assertion that Col. Reich's Due Process rights were violated because the Georgia Supreme Court construed the refund statute to be inapplicable to taxes paid under a law later held unconstitutional. *See* Petition for Certiorari, pp. 19-25; Brief In Opposition To Petition For Certiorari, pp. 23-27. According to Col. Reich, "Georgia's overall remedial scheme was unclear and uncertain because Georgia provided a clear and certain predeprivation [sic] remedy in the refund statute, but Georgia later eliminated this remedy after the time for other relief had expired." Petitioner's Brief, p. 10. Amici supporting Col. Reich echo this theme. COST protests that " '[b]ait and switch' tax challenge schemes and remedial 'shell games' *ipso facto* violate both the spirit and substantive principles of Due Process. . . . [T]he Georgia Supreme Court's behavior in the current case [is] an egregious example of a '[fiscal] ends justifies the means' jurisprudence. . . . " Amicus Brief of COST, pp. 8-9. The Tax Executives Institute ("TEI") complains that

> [the Georgia Supreme Court] parsed the Georgia refund statute, and studied the other provisions of the Georgia Code, not in search of principle or justice, but for a loophole. It sought not to implement the Court's mandate in *Beam, Davis* and *Harper*, but to obliterate it. That the court below's action might pass muster under federal due process principles truly beggars the imagination.

Amicus Brief of TEI, p. 16.

Col. Reich and his amici continue to revisit the Georgia Supreme Court's interpretation of O.C.G.A. § 48-2-35

– despite this Court's refusal to accept for review Col. Reich's Due Process argument concerning that issue – because they do not want to believe that a taxpayer can ever properly be denied a refund of taxes paid under a statute later held unconstitutional, except perhaps for failure to comply with a refund statute's procedural requirements. Hence, they cannot willingly accept any result in this case other than full refunds. Due Process is the vehicle which they hope to use to achieve this result, but Due Process – at least not Due Process as presently viewed by the Court – is not their real concern. If it were, they would pay closer attention to this Court's holding in *Harper,* where the Court stated that "federal law does not necessarily entitle [federal retirees] to a refund" of amounts paid on their benefits for years before 1989 under income tax statutes invalidated by *Davis.* 113 S. Ct. at 2519. "Rather, the Constitution requires [a state simply] 'to provide relief consistent with federal due process principles.' " *Id.* at 2519 (quoting *American Trucking Assns v. Smith,* 496 U.S. 167, 181 (1990) (plurality opinion)). "[I]n order to satisfy the commands of the Due Process Clause[, the] State may choose to provide a form of 'predeprivation process' ". *McKesson,* 496 U.S. at 36.

Despite these clear pronouncements from the Court, COST asserts that "[n]othing could be more violative of the concept of fairness than to permit a State to retain revenues from a tax that it should not have imposed or collected in the first place." Amicus Brief of COST, p. 7. According to the Tax Executives Institute, "[t]his basic truth – that the States have funds properly belonging to the taxpayers – should impel reversal of the court below and a judgment ordering that a refund be made to the

petitioner." Amicus Brief of TEI, p. 8. Unless this Court re-writes its Due Process jurisprudence to date, and retracts its statement in *Harper* that "federal law does not necessarily entitle [federal retirees] to a refund", these arguments must be rejected.

III. THE ARGUMENTS OF AMICUS JAMES B. BEAM CO. LACK MERIT AND RELATE PRIMARILY TO BEAM'S OWN CASE

Amicus James B. Beam Distilling Co. primarily argues the "merits" of its own lawsuit.[7] Not only does Beam mischaracterize the background, statutes, and decisions in the *Beam* litigation, but as shown by Georgia's "Op. Cert. Brief" in *Beam,* Beam's lack of standing under § 48-2-35 to obtain a refund of taxes which its wholesalers paid to Beam to satisfy their own tax liability bars a refund in Beam's case, regardless of the outcome of the instant case.[8] *See Beam* Op. Cert. Br. (U.S. S. Ct. Case No.

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[7] *James B. Beam Distilling Co. v. State of Georgia,* 263 Ga. 609, 437 S.E.2d 782 (1993), *petition for cert. filed,* 62 U.S.L.W. 3503 (1994) (U.S. S. Ct. Case No. 93-1140) (hereinafter "Beam" when referring to the company and "*Beam*" when referring to Beam's litigation).

[8] The instant *Reich* case is not a companion case with *Beam* and will not resolve the *Beam* case, with its lack of standing aspect, alcohol regulatory system, dollar amounts, etc. Indeed, contrary to Beam's argument in its amicus brief that this Court's only proper option is to enter judgment for Beam for double the amount of distilled spirits taxes paid at a discriminatory rate, in the Georgia Supreme Court Beam argued, alternatively to its main position, that the favored manufacturers could be assessed at the higher tax rate or that Beam's wholesalers recover a refund through Beam. Appellant's Briefs in S93A1217 at 12-13,

93-1140), pp. 1-16, lodged by Respondents in the instant case for the Court's convenience. Also, in *Beam*, Georgia has additional reliance interests and equitable considerations, and the mandate of this Court in *Beam* expressly dictated that matters of such type were to be considered on remand. *Id.* at 16-19; *Beam*, 111 S. Ct. at 2448 (individual equities, procedural requirements and procedural bars, as well as reliance interests, may properly be considered in resolving remedial issues on remand). Beam's implied duress arguments under Georgia's alcohol system are irrelevant to this case, and erroneous.[9]

While alcohol taxpayers have other remedies, there is some overlap in Georgia's predeprivation remedies for alcohol taxpayers and income taxpayers. *See Beam* Op. Cert. Brief (No. 93-1140), pp. 21-24. However, Beam, like

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26, and S93A1218 at 13, 16. Those arguments were not reached by the Georgia courts.

[9] Under former O.C.G.A. § 3-4-61(a)(2) (providing that liquor tax stamps were to be affixed by the manufacturer *or* wholesaler prior to the *retail* tier), the delivery by a manufacturer of distilled spirits to its Georgia wholesaler without tax stamps affixed (even before stamps were eliminated in 1993) was not a crime, not contraband, nor a ground to revoke any liquor license. *Beam*, R. (S93A1217) 120-21. *See also Beam* Op. Cert. Brief (No. 93-1140), pp. 4-19, 24-28. None of the forms of duress alleged by Beam solely for alcohol taxpayers exists. *Id.* – and as a reply brief on the merits in *Beam* would further show.

Also, Beam's assertions concerning Georgia's 1985 liquor tax laws are inaccurate and irrelevant even to the *Beam* case itself, which involves only the 1938 version of Georgia's liquor tax, and appear more related to Beam's later, pending suits with other plaintiffs to invalidate the 1985 statute. *E.g.*, *Age Int'l, Inc. v. Georgia*, Superior Court of Fulton County, Georgia, Civil Action No. E-3793, filed July 10, 1992.

Col. Reich, errs in asserting that a suit for declaratory judgment or to enjoin an unconstitutional tax is barred in Georgia by sovereign immunity. *See, e.g., Chilivis v. National Distrib. Co., supra; Undercofler v. Seaboard Air Line R.R., supra.* Also, Beam's amicus brief essentially makes a *Brinkerhoff* argument, based upon a portion of the Georgia Supreme Court's decision in *Reich I.* That argument is not only without merit in itself, *see, e.g., Beam* Op. Cert. Brief (No. 93-1140), pp. 24-29, but certiorari was not granted by this Court on that issue.

Since the *Reich* and *Beam* cases are distinct, and since Georgia has a full rebuttal to each of Beam's assertions, the Court should resolve *Beam* separately from the instant case, either by denying certiorari or by allowing the State to file a reply brief therein prior to any disposition on the merits of *Beam*.

IV. EVEN IF GEORGIA'S PREDEPRIVATION TAX PROCEDURES DID NOT SATISFY DUE PROCESS, PETITIONER IS NOT ENTITLED TO A JUDGMENT DIRECTING THAT REFUNDS BE PAID

Even if Georgia's predeprivation tax procedures did not satisfy Due Process, there are at least two distinct reasons why Petitioner should not be given a judgment directing that refunds be paid. Sovereign immunity, and the State's reliance interests and other equitable considerations, preclude the recovery sought by Col. Reich.

A. Sovereign Immunity Precludes An Award Of Money Damages Against The State In This Case

Under Georgia's doctrine of sovereign immunity, a suit cannot be maintained against the State without its consent. *Irwin v. Woodliff*, 125 Ga. App. 214, 216, 186 S.E.2d 792, 794 (1971); *National Distrib. Co. v. Oxford*, 103 Ga. App. 72, 73, 118 S.E.2d 274, 275 (1961). *See* Ga. Const. of 1983, Art. I, Sec. II, Para. IX. Although the income tax refund statute, O.C.G.A. § 48-2-35, provides a limited waiver of the State's sovereign immunity, *Henderson v. Carter*, 229 Ga. 876, 879, 195 S.E.2d 4, 6 (1972), the Georgia Supreme Court determined in *Reich I* that this section does not apply to taxes paid under a statute later held unconstitutional. Petitioner apparently believes that if Georgia's predeprivation tax procedures did not satisfy Due Process, then he has a federal cause of action directly under the Fourteenth Amendment for refunds, notwithstanding the State's sovereign immunity. This belief is incorrect. *See* Brief Amici Curiae of National Governors' Conference, *et al.*, pp. 5-16. The Court should either hold that sovereign immunity precludes the refunds sought by Petitioner, or permit the Georgia courts to consider the issue on remand.

B. The State's Reliance Interests And Other Equitable Considerations Preclude The Recovery Sought By The Taxpayer Here

Even without regard to sovereign immunity, Col. Reich is not entitled to refunds if Georgia's predeprivation tax procedures are found to have been insufficient

for Due Process purposes. *McKesson* addresses only a state's Due Process obligation to return taxes collected under a statute which the state, from the date of enactment, knew or should have known was unconstitutional. As the Court observed in *McKesson*, "[t]he [challenged] Liquor Tax reflected only cosmetic changes from the prior version of the tax scheme that itself was virtually identical to the Hawaii scheme invalidated in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). . . . The State can hardly claim surprise at the Florida courts' invalidation of the scheme." 496 U.S. at 46. *See also* Hellerstein, *Preliminary Reflections On McKesson and American Trucking Associations*, 48 Tax Notes 325, 325 (1990) (*McKesson* held that "a taxpayer who is compelled to pay a tax that is later held to be unconstitutional under established Commerce Clause principles is entitled to meaningful retrospective relief.") By contrast, Georgia's tax treatment of federal retirees was not patently unconstitutional prior to *Davis*. *See Harper*, 113 S. Ct. at 2538 ("The circumstances in *McKesson* were quite different than those here. In *McKesson*, the tax imposed was patently unconstitutional.") (O'Connor, J., dissenting).

Georgia's reasonable reliance interests and other equitable considerations form a basis in their own right for denying the recovery sought by Col. Reich in this case. The majority opinion in *Harper* concluded that *Davis* applied retroactively, as a federal choice-of-law matter, because the rule of law announced in *Davis* was applied to Mr. Davis himself. "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review

and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper,* 113 S. Ct. at 2517. This retroactivity rule derived from the Supreme Court's earlier decision in *Beam,* where the Court then went on to observe that "[n]othing [in a situation like this] deprives [the State] of [its] opportunity to . . . demonstrate reliance interests entitled to consideration in determining the nature of the *remedy* that must be provided." *Beam,* 111 S. Ct. at 2448 (emphasis added).

Even before *Beam,* Justice Harlan recognized that:

> [reliance and other equitable considerations should be taken] into account in the determination of what *relief* is appropriate in any given case. There are, of course, circumstances when a change in the law will jeopardize an edifice which was reasonably constructed on the foundation of prevailing legal doctrine. Thus, it may be that the law of remedies would permit rescission, for example, but not an award of damages to a party who finds himself able to avoid a once-valid contract under new notions of public policy.

United States v. Estate of Donnelley, 397 U.S. 286, 296 (1970) (Harlan, J., concurring) (emphasis added). *Accord Lemon v. Kurtzman,* 411 U.S. 192, 198-99 (1973) (noting that state officials, and those with whom they deal, are entitled to rely on a presumptively valid state statute, and deciding remedial issues based on the state's reliance interests).

In *American Trucking Assns v. Smith,* 496 U.S. 167 (1990) ("*ATA*"), the plurality asserted that "[t]he determination whether a constitutional decision of [the U.S.

Supreme Court] is retroactive – that is, whether the decision applies to conduct or events that occurred before the date of the decision – is a matter of federal law," governed by the *Chevron Oil* test. *Id.* at 177. The dissent in *ATA* argued that "[c]lose examination of *Chevron Oil* and its progeny reveals that those cases establish a *remedial* principle. . . . The civil cases upon which *Chevron Oil* relied . . . are all *remedy* cases in which, as Justice Harlan explained, consideration of reliance might be appropriate." *Id.* at 219-20, 223 (Stevens, J., dissenting) (emphasis added).

It is now clear that – whatever the precise standard by which to measure the retroactivity of this Court decisions as a federal choice-of-law matter – the reliance interests and equities of the parties may be used to determine the proper *remedy* when a state statute is invalidated on federal constitutional grounds. *See, e.g.,* Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies,* 104 Harv. L. Rev. 1733 (1991) (equities, including novelty and hardship, should guide the determination of remedy, rather than the choice-of-law). After reviewing the Supreme Court's decisions in this area, Justice O'Connor concluded in *Harper* that "Justice Stevens' view [in *ATA*] has [apparently] prevailed". *Harper,* 113 S. Ct. at 2537 (dissenting opinion). As a consequence, "state and federal courts still retain the ability to exercise their 'equitable discretion' in formulating appropriate *relief* on a federal claim." *Id.* (emphasis added).

Georgia's basic statutory scheme invalidated by *Davis* had been in effect since the 1940's. *See* 1943 Ga. Laws 640, 668, § 10 (establishing income tax exemption for retirement benefits from Teachers Retirement System

of Georgia). In addition, "how the intergovernmental tax immunity doctrine and 4 U.S.C. § 111 applied to . . . revenue statutes [like Georgia's] was anything but clearly established prior to *Davis.*" *Swanson v. Powers,* 937 F.2d 965, 971 (4th Cir. 1991), *cert. denied,* 60 U.S.L.W. 3478 (U.S. Jan. 13, 1992). Despite its reasonable reliance on the constitutionality of its income tax statutes, and other equitable considerations, Georgia faces a potential refund liability to federal retirees (with interest) of approximately $100 million which has been budgeted and spent. When these factors are properly weighed, it is clear that refunds should not be awarded. This Court should either deny outright an award of refunds or permit the Georgia courts themselves, on remand, to weigh these factors in determining the appropriate relief.

CONCLUSION

Respondents respectfully request that the decision of the Georgia Supreme Court be affirmed.

WARREN R. CALVERT
Senior Assistant Attorney General
(Counsel of Record for Respondents)

MICHAEL J. BOWERS
Attorney General

DANIEL M. FORMBY
Senior Assistant Attorney General

Attorneys for Respondents

Georgia Department of Law
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3370

APPENDIX A

O.C.G.A. § 48-3-1. Execution for collection of money due the state; affidavit of illegality.

The commissioner may issue an execution for the collection of any tax, fee, license, penalty, interest, or collection costs due the state. The execution shall be directed to all and singular sheriffs of this state or to the commissioner or his authorized representatives and shall command them to levy upon the goods, chattels, lands, and tenements of the taxpayer. Each sheriff shall execute the execution as in cases of writs of execution from the superior courts. Whenever any writ of execution has been issued by the commissioner, the taxpayer, in order to obtain a determination of whether the tax is legally due, may tender to the levying officer his affidavit of illegality to the execution and, upon his payment of the tax if required as a condition precedent by the law levying the tax or upon his giving a good and solvent bond in such an amount to cover the total of any adverse judgment plus costs where the law does not require the payment of the tax as a condition precedent, the levying officer shall return the affidavit of illegality, except as otherwise provided by law, to the superior court of the county of the taxpayer's residence. The affidavit of illegality shall be summarily heard and determined by the court.